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In The

Supreme Court of the United States

October Term, 1995

THE PITTSTON COMPANY and
CLINCHFIELD COAL COMPANY,

Petitioners,

v.

BRUCE BABBITT, Secretary, United States Department of Interior, and
COMMONWEALTH OF VIRGINIA, Department of Mines, Minerals & Energy, Division of Mined Land Reclamation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITIONERS' REPLY MEMORANDUM

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STATUTES:

30 U.S.C. § 1276(a)(1) 1, 2, 4

PETITIONERS' REPLY MEMORANDUM

I THE CONFLICT IN THE CIRCUITS IS IMPORTANT AND SHOULD BE RESOLVED

In opposition, the Secretary acknowledges a direct conflict in the circuits on whether district courts outside the District of Columbia have jurisdiction to review the promulgation of surface mining regulations, but argues that the conflict "does not warrant this Court's review." Brief in Opp., p. 8. The reason given is that the Court of Appeals for the Sixth Circuit may one day change its mind and join the other circuits in holding that jurisdiction under 30 U.S.C. § 1276(a)(1) is exclusive, not concurrent. *Id.* pp. 8-9. And, the Secretary continues, if the Sixth Circuit Court of Appeals does not overrule *Holmes Limestone Co. v. Andrus*, 655 F.2d 732 (1981), *cert. denied*, 456 U.S. 995 (1982), the next time the issue is before it, then this Court can grant *the Secretary's* petition for a writ of certiorari. *Id.* p. 9

It is not likely, as the Secretary contends, that the conflict among the circuits will be soon resolved. Just 14 months ago in *Horizon Coal Corp. v. United States*, 43 F.3d 234 (6th Cir. 1994), the Court of Appeals for the Sixth Circuit rejected the government's claim that the Court of Claims had exclusive jurisdiction to hear a claim for refund of SMCRA reclamation fees. The Court of Appeals cited *Holmes* for the proposition that a finding of exclusive jurisdiction would work a hardship against coal operators by requiring them to litigate their claims in Washington, D.C., rather than in the appropriate district court. 43 F.3d at 240 n.5.

The Secretary argues that *Horizon* cannot be read as affirming the Sixth Circuit's prior jurisdictional holding in *Holmes*, because *Horizon* involved a suit for a refund of reclamation fees, not a challenge to a national rule, and the issue was whether the court had concurrent jurisdiction with the Court of Claims. Brief in Opp., p. 9. The Secretary's effort to diminish the court's favorable reference to *Holmes* misses the mark.

It is true that the jurisdictional language of 30 U.S.C. § 1276(a)(1) was not before the court in *Horizon*. However, the Sixth Circuit's policy favoring concurrent jurisdiction certainly was. In view of the fact the *Horizon* court cited and quoted *Holmes* in support of that policy, it is implausible to suggest the Sixth Circuit might reverse its interpretation of § 1276(a)(1) in a future case.

The Court should decline the Secretary's invitation to delay resolution of this important question. For almost fifteen years, national mining regulations have been freely reviewable in the Sixth Circuit, but not elsewhere. Local review should be extended to the regulated companies in other circuits or it should be prohibited everywhere.

While the Secretary attempts to diminish the importance of the jurisdictional issue, it was thought to be quite serious when the government was the petitioner in *Holmes*. In its petition for a writ of certiorari, the government told the Court that the decision in *Holmes* "jeopardizes a primary purpose of the Act," presenting an "important" and "serious" issue worthy of this Court's immediate attention. Pet. in *Watt v. Holmes Limestone Co.*, No. 81-1585, pp. 8-9.

II DISTRICT COURTS OUTSIDE THE DISTRICT OF COLUMBIA SHOULD BE HELD TO HAVE CONCURRENT JURISDICTION TO REVIEW THE PROMULGATION OF REGULATIONS

In defense of the decision below, the Secretary cites several cases for the proposition that where Congress "specifically designates" a forum for administrative review that forum is exclusive, even if Congress does not expressly state that the forum is exclusive. Brief in Opp., pp. 5-6. But the Secretary's authorities do not answer this case. Here we have a statute that expressly provides for exclusive review in some cases, but not others – and not this one.

In such circumstances, we submit that the Court is justified in applying the *Abbott* presumption in favor of unrestricted judicial review. *Abbott Lab. v. Gardner*, 387 U.S. 136, 141 (1967). Absent "persuasive reason for restricting access," review should not be limited. *Gutierrez de Martinez v. Lamagno*, 115 S. Ct. 2227, 2231 (1995).

III THE SCOPE OF ANY EXCLUSIVITY SHOULD BE DETERMINED

Even if the statute clearly gave the District of Columbia court exclusive jurisdiction to review the promulgation of regulations, this case would justify the Court's attention. The Court of Appeals for the Fourth Circuit has prohibited local challenges not only to the promulgation of regulations but also to their application. App. Pet. p. 23a; *Virginia v. Watt*, 741 F.2d 37, 40 (4th Cir. 1984), *cert. granted*, 469 U.S. 979, *cert. dismissed* (case settled), 469 U.S.

1198 (1985) (any action taken by the Secretary "in accordance with" regulations deemed immune from local review). This interpretation of the statute goes too far, effectively denying local review in an array of cases that do not involve the promulgation of regulations, but their application.

Whether 30 U.S.C. § 1276(a)(1) requires as-applied challenges to regulations to be brought in the District of Columbia is not, as the Secretary suggests, a "fact-specific" issue having no general importance. Brief in Opp., p. 11. As-applied cases are, of course, fact-specific by their nature, but whether the District of Columbia is the exclusive forum for such cases is a legal issue, not a factual one, and one of significance to the mining industry. See Amicus Brief of National Mining Association, pp. 3-4.

Finally, the Secretary states that the due process issue raised by Pittston in this case will be decided by the District of Columbia courts in other litigation now pending there. Brief in Opp., pp. 2-3, 11. As a result, the Secretary suggests that Pittston's case need not be heard. The Secretary is mistaken. The District of Columbia litigation is purely a facial challenge to the ownership or control rules. Here, by contrast, Pittston asked the court to review the Secretary's enforcement of the regulations against Pittston under a specific set of facts. The two types of cases are materially different. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294 (1981). Pittston's as-applied case should not be rejected because the regulations are subject to a facial challenge in another court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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